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UNLIMITED JURISDICTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

vs.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC 422 252

[Assigned to the Hon. John L. Segal, Judge, Dept. "50"]

PLAINTIFF'S OPPOSITION TO MOTION FOR NEW TRIAL OR ALTERNATIVE JNOV

Date: **June 6, 2012**
Time: **8:30 a.m.**
Dept.: **"50"**

Action Filed: **September 22, 2009**
Trial: **March 5, 2012**

TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiff William Taylor (hereafter "plaintiff") hereby opposes the Motion for New Trial or alternative JNOV by Defendant City of Burbank ("defendant").

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Dated: May 17, 2012

LAW OFFICES OF GREGORY W. SMITH

By: _____

GREGORY W. SMITH
CHRISTOPHER BRIZZOLARA
Attorneys for Plaintiff
WILLIAM TAYLOR

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

The instant motion by defendant is premised upon a plethora of inadmissible hearsay, double hearsay, triple hearsay, speculation, improper and inadmissible statements regarding the alleged state of mind of jurors, and other improper and inadmissible alleged facts and evidence. Concurrently herewith plaintiff has filed objections to such alleged facts and evidence. However, even if the defendant's motion was supported by appropriate and admissible evidence, the motion would still be unfounded and should be summarily denied by this Court. Plaintiff will address each of the alleged "paramount issues" which defendant has raised as the grounds for its motion below.

The California Constitution limits the power of the trial court to grant a new trial "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." *California Constitution*, Article. VI, § 13 (emphasis added); see *Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1324.

Further, a new trial cannot be granted for error of law unless the error was prejudicial, i.e., the error must likely have affected the outcome of the trial. *Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826; see *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 866-867. Further, *C.C.P.* Section 475 provides that there is no presumption of prejudice or injury from error in the law. As such, the burden on a motion for new trial is on the moving party, not only to show error, but also to show injury from the error. Witkin, *California Procedure, Appeal*, (9th Ed. 1996), Section 412.

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II. NONE OF THE JURORS WITHHELD ANY MATERIAL INFORMATION DURING VOIR DIRE OR ENGAGED IN ANY OTHER ALLEGED MISCONDUCT JUSTIFYING A NEW TRIAL

The defendant's primary ground asserted as the basis for a new trial is purported misconduct of two jurors (6 and 7) in not volunteering during voir dire (despite he fact that they were not ever even asked) that they had allegedly been previously arrested and/or convicted of insignificant misdemeanors, infractions, and/or minor traffic citations.[1] Notably, while defense counsel now claims that such information would have been vital to defense counsel in deciding whether to exercise preemptory challenges to these jurors, defendant and its counsel never asked either of these jurors (or any of the jurors or potential jurors in this matter) whether any of them had ever been arrested or convicted of any crimes, infractions, or traffic citations. Defendant has failed to establish that either of these jurors answered in a willfully false manner in regard to any question asked of them during voir dire, or that either of these jurors had any bias or any kind against defendant based upon their alleged arrests and/or convictions. Further, defendant has failed to establish that defendant was prejudiced in any manner by any alleged bias of either of these jurors or any other trial juror in this matter.

First, while defense counsel now clams that a history of criminal arrests and/or

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1/ As set forth in the objections filed concurrently herewith, plaintiff does not concede that the individuals who were the subject of these insignificant misdemeanors, infractions, and minor traffic citations are either jurors 6 or 7, or any other juror in this matter. Defendant's alleged "identification" of these individuals as jurors 6 and 7 is premised upon layer upon layer of inadmissible and unreliable hearsay from unauthenticated web sites and alleged identification of such jurors through unauthenticated photos, videos, and blogs by defense counsel. Not surprisingly, none of this alleged evidence has been submitted with the defendant's moving papers since none of it can be properly authenticated under any possible rule of evidence.

convictions by any member of the jury would have been pertinent to how defense counsel exercised their preemptory challenges during the voir dire process, defense counsel never asked the court to ask any prospective juror, and never personally any prospective juror, and in particular never asked jurors 6 or 7, whether they had ever been arrested or convicted of any crime, infraction, or traffic citation. As such, neither juror 6 nor 7 provided any willfully false answer or other information regarding any alleged history of arrests and/or convictions of any crime, infraction, or traffic citation at any time during the voir dire process or at any other time during this matter.

Instead, the defense premises its claims of juror misconduct upon the Court inquiring of all of the prospective jurors: 1) "Have any of you had any contact or involvement with law enforcement that was particularly positive or negative that might affect your ability to be fair and impartial?" and 2) "Have any of you had any contact with a law enforcement organization of any kind, such as the police or security or anything like that, that was strictly positive or negative?"

Thus, the only questions that were asked of the prospective jurors were questions by the Court regarding whether any juror had a contact with law enforcement that was subjectively to the juror "particularly positive or negative". Defendant has failed to present any evidence that jurors 6 or 7 had any contact with law enforcement that either juror subjectively considered to be "particularly positive or negative".

A review of the alleged evidence filed by defendant in this issue reveals that the alleged contacts between jurors 6 and 7 and law enforcement regarded trivial matters that would not be expected to generate any prejudicial bias toward law enforcement, and particularly any bias toward the City of Burbank or its police department, which had nothing to do with any of the alleged arrests and/or convictions of jurors 6 and 7. Instead, the alleged "criminal conduct" of juror number 6 is limited to a single arrest and no contest

plea occurring approximately 9 years before this trial for the charge of "failing to disperse", for which the individual apparently received a $100.00 fine. The alleged "criminal conduct" of juror number 7 is limited to arrests for traffic citations for driving on a suspended license, for which the individual again pled no contest and received a minimal fine of about $90.00. Defendant has presented no evidence that either juror 6 or 7 subjectively considered any of their alleged contacts with law enforcement to be "particularly positive or negative", or that "might affect [their] ability to be fair and impartial". Plaintiff's counsel respectfully submits that if no juror can be trusted to remain fair and impartial toward plaintiffs or defendants employed in the law enforcement field based upon having been arrested or convicted for minor infractions or traffic citations, then it would be difficult if not impossible to ever obtain a jury in any case involving parties employed in the field of law enforcement.

In particular, none of these alleged arrests were made by or had anything to do with the Burbank Police Department or any the individuals who testified on behalf of defendant in this matter. Defendant has not presented any evidence that the arrests and/or convictions of these individuals for minor infractions and traffic citations caused either of them to harbor any prejudicial bias against the defendant during the trial and deliberations in this matter. While defense counsel admit that they communicated with and had the contact information for multiple jurors, defendant has failed to present a single declaration from any juror that either juror 6 or 7 expressed or exhibited any prejudicial bias toward defendant at any time during the trial or during the deliberations of the jury in this matter.

Thus, defendant's vehement protests over the insignificant "criminal histories" of these jurors is nothing more that "sound and fury signifying nothing". Defendant has even failed to explain why jurors with an alleged history of criminal arrests and/or

convictions would be expected to harbor more bias toward the defendant in this matter, who claimed to be a public entity and law enforcement agency that terminated plaintiff for having covered up the use of excessive force and false statements by other law enforcement officers in making arrests and investigating the Porto's Bakery Robbery, than toward plaintiff, who defendant repeatedly contended had engaged in misconduct as a law enforcement officer.

The primary case relied upon by defendant regarding its claims of juror misconduct is *Enyart v. City of Los Angeles* (1999) 5 Cal.3d 98. However, the *Enyart* case is readily distinguishable. In *Enyart*, three of the trial jurors (Bell, Rhone-Key, and Joseph) indicated in their jury questionnaires and during voir dire that they did not harbor any negative feelings toward the defendant City or the LAPD and that they could render a fair verdict based solely on the evidence presented at trial. Following a jury verdict against the defendant, the defendant filed with the trial five declarations in which other trial jurors set forth specific facts regarding negative bias held by jurors Bell, Rhone-Key, and Joseph, including the following: 1) Juror Pinger stated in a declaration that, inter alia: "Certain jurors, including Rhone-Key, Bell and Joseph in particular, expressed extremely negative attitudes, in general, about the city and the police . . . . They expressed and implied . . . that the city/police . . . *regularly and routinely 'screws over' people*." (Italics added by Court of Appeal in *Enyart* opinion); 2) Juror Ward's declaration stated, inter alia: Jurors Rhone-Key, Bell and Joseph, "said the City and LAPD *always hide things and are untruthful*, in their opinion and based on their own life experiences." (Italics added by Court of Appeal in *Enyart* opinion.); 3) Juror Fernandez-Flygare stated that certain jurors, especially Rhone-Key and Bell "engaged in long-winded 'speeches' not about the evidence, but rather about such things as how *they 'know,' from their own experience, about the City and the police concealing the facts and hiding the truth and doing wrong*."

(Italics added by Court of Appeal in *Enyart* opinion.) 4) Juror Arredondo stated in declaration that jurors Rhone-Key, Bell and Joseph attacked jurors who favored the defense and "[n]othing could stop their lengthy tirades expressing how *the city and police are not to be trusted and how the city and police conceal the truth and lie.*" (Italics added by Court of Appeal in *Enyart* opinion.); and 5) Juror Perez stated: juror Joseph "stated during the deliberations that the City and police *always conceal and falsify evidence; he said that they 'screw over' people and are not to be trusted.*" (Italics added by Court of Appeal in *Enyart* opinion.) Notably, while Juror Bell flatly denied in a counter-declaration that she, Joseph or Rhone-Key expressed any negative attitudes toward the City or the LAPD, jurors Joseph and Rhone-Key did not deny they displayed such negative attitudes. Rather, jurors Joseph and Rhone-Key stated: "Any negative attitudes about the city or police that I heard or stated related to how the evidence in the case substantiated the plaintiff's claims". Two other jurors who voted with the majority, Vergara and Brady, likewise stated "the negative attitudes about the city or police that I heard related to how the evidence in the case substantiated the plaintiff's claims."

The *Enyart* court found that given the five moving declarations and four counterdeclarations, the only reasonable inference to be drawn from this record is that certain of the majority jurors had expressed negative attitudes toward the City and the LAPD. On that point, the moving and opposing declarations were in accord. The only question the court believed existed was whether the negative attitudes were based solely on the evidence in the case, or whether the negative attitudes were the product of bias. The *Enyart* court concluded the latter to be the case, finding that clear the negative attitudes expressed by certain majority jurors were based on bias.

Here, defendant has not submitted a single declaration from a single juror or any other evidence of any kind that jurors 6 or 7 expressed any negative attitudes about the

defendant or its police department, or that they expressed and/or implied that the defendant and/or its police department regularly and routinely 'screws over' people. Defense counsel admits that defense counsel communicated with multiple jurors following the verdict, and in fact has set forth multiple statements allegedly made by such jurors, none of which evidence that jurors 6 or 7 had or expressed during deliberations or at any other time any negative bias or attitudes toward the defendant or its police department. Defendant has not presented a shred of evidence that jurors 6 or 7 or any other jurors concealed or failed to disclose any improper bias or attitude toward defendant or its police department of any other law enforcement agency or personnel.

Further, a review of the cases regarding jurors allegedly concealing and/or failing to provide information during voir dire does no not support the defendant's contentions. For example, in *Scott v. McPheeters* 1942)52 Cal. App. 2d 61, the court denied a motion for new trial where one of the jurors who voted for the prevailing defendant in a medical malpractice jury trial had previously been a patient of the defendant within four years of the trial. In *Philbrick v. Weinberger* (1964)228 Cal. App. 2d 681, the court denied a motion for new trial where one of the jurors who voted for the prevailing defendant had denied during voir that she or any member of her family knew the defense counsel or any member of his firm (Spray, Gould & Bowers), even though she had met Joseph Spray, one of the founders of the firm, and the father of the defense counsel on the case(Joseph Spray, Jr.), her husband had been a friend of the senior Mr. Spray, and during that during the second or third day of trial she recognized the name Joseph Spray. The court found that even under these circumstances there was insufficient evidence of willful falsity by the juror, and that there had also not been an affirmative showing of both willful falsity and prejudice, and that no ground for a new trial existed, citing *George* v. *City of Los Angeles* (1942) 51 Cal.App.2d 311. In *Earl v. The Times-Mirror Company* (1921) 185 Cal. 165,

the court denied a motion for new trial even though one of the jurors voting for the prevailing party had previously cancelled his subscription to the defendant Los Angeles Times based upon his express dislike of the paper's position on various issues, and had failed to indicate his dislike of the defendant newspaper despite being asked repeatedly during voir dire which newspaper he had purchased and/or read. In *George v. City of Los Angeles* (1942) 51 Cal.App.2d 311, the court denied a motion for new trial despite: 1) a juror testifying that during the course of the trial he juror had visited the scene of the accident which was the subject of the case; 2) a juror failing to disclose during voir dire that the juror had traveled upon the street where the accident which was the subject of the case occurred; 3) a juror denying during voir dire that she or her husband had ever been involved in an accident in which personal injuries were suffered, even though her husband had previously received injuries to his hand and other injuries in two separate automobile accidents. In *Mast v. Claxton* (1930) 107 Cal. App. 59, the court denied a motion for new trial even though one of the jurors who voted for the prevailing party had previously been represented by the attorney for that party, and that attorney had previously obtained a judgment on behalf of that juror in that other action. In *Mast*, the California Supreme Court laid down the now long standing rule that a motion for a new trial will not be granted upon the ground that a juror upon *voir dire* examination has incorrectly answered questions, in the absence of a showing that: " (1) prejudice has resulted to the moving party, or (2) there were willfully false and untruthful answers given by the juror which would lead to the inference that the juror was animated by a dishonest motive in qualifying." *Mast* v. Claxton, *id.* 107 Cal. App. 59, 67.

Here, defendant has failed to show that any prejudice resulted to the defendant through any of the alleged failures of jurors 6 or 7 to disclose their alleged prior arrests and/or convictions for minor misdemeanor/infractions/traffic citations. Further, defendant

has failed to establish that jurors 6 or 7 made any willfully false and untruthful answers during voir dire that would reasonably lead to the inference that either of these jurors was animated by a dishonest motive or had some other improper agenda in regard to be selected as a trial juror in this case.

III. DEFENDANT CANNOT IMPEACH THE VERDICT WITH ALLEGED STATEMENTS BY JURORS REGARDING THEIR SUBJECTIVE REASONING IN REACHING THEIR VERDICT

Defense counsel's declaration in support of defendant's motion is replete with references to alleged statements by jurors which pertain to the jurors' subjective reasoning in reaching their verdict.. However, an affidavit may not be used to impeach a verdict by showing a juror's subjective reasoning. *Evidence Code* § 1150; *Krouse v. Graham* (1977) 19 Cal.3d 59, 81; *Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 385; *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 146; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910.

For over 140 years the law of California has been that assent to a recorded verdict, expressed by the presiding juror, is conclusive on all the jury, unless a disagreement is expressed at the time. *Blum v. Pate* (1862) 20 Cal 69.

As stated by Justice Mosk in his concurring opinion in *Ballard v. Uribe* (1986) 41 Cal. 3d 564:

> " I must express my apprehension at an incipient trend, that of losing parties attempting to impeach jury verdicts. We see this in numerous appeals and petitions for review based on juror affidavits. Giving such appeals and petitions any credence prevents the finality of judgments, places additional burdens on the judicial process, and contributes to disenchantment with the tort system. Most juror affidavits, demonstrably

so in this case, delve into the subjective concerns of the jurors during their deliberations. When deference is given to such affidavits, encouragement is given to opposing counsel in future cases to engage in postverdict competition to obtain juror affidavits revealing discussions that took place behind the closed doors of the deliberation room. Generally the party with the most resources will win that contest. If affidavits purportedly relating jury discussions are permissible, in the interest of accuracy we may as well install recording devices in jury rooms. In most cases it is not difficult for counsel to persuade a juror to sign a law-office-prepared affidavit. Human nature being what it is, dissenting jurors in a case that ended in a nine-to-three verdict may be eager to upset a result to which they were stubbornly opposed. (citation omitted) And even some assenting jurors who were not firmly committed to their vote but were persuaded by the majority may wish to assuage a feeling of remorse, or merely desire to placate a disappointed losing litigant." *Ballard v. Uribe, id.,* 41 Cal. 3d at 575.

Here, defendant should not be allowed to attempt to indirectly (through the declaration of defense counsel recounting alleged hearsay statements regarding the subjective reasoning in reaching their verdict) what defendant cannot not do directly through juror affidavits regarding such subjective reasoning. As such, any assertions by defense counsel in his declaration filed in support of defendant's motion which purport to set forth the subjective reasoning of any juror during deliberations and/or in reaching the verdict should be stricken and disregarded.

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IV. DEFENDANT WAS NOT ENTITLED TO THE JURY BEING GIVEN CACI INSTRUCTION 2405

Defendant's next alleged "paramount" ground for a new trial is its contention that the Court should have given the jury *CACI* 2405. Defendant's contention is unfounded.

First, defendant claims that it "inadvertently" failed to request *CACI* 2405 until the day of closing arguments, even though defendant had two of the most experienced law firms in Southern California as its trial counsel, as well as having the resources of the Burbank City Attorney's Offices at its disposal. Defendant's request for this instruction was untimely, and was prejudicial to plaintiff since the evidence in the case had been concluded by the time that defendant first requested this instruction, and plaintiff and his counsel had finalized their preparations for closing arguments.

Second, *CACI* 2405 is an instruction that is designed to be utilized in cases based upon breach of an implied employment contract for an unspecified term. As the Court is well aware, non-public employees in California are presumed as a matter of law to be "at will" and subject to termination for any reason other that a reason that violates fundamental public policy.

In contrast, public employees, such as the plaintiff herein, are not "at will" employees who can be terminated for any reason once they have passed their probationary period and become full time public employees. At that juncture, public employees are afforded civil service and other procedural protections from being demoted and/or terminated which are not provided to at will employees. The plaintiff in this case was a public employee of the defendant who had long ago passed his probationary period, was in no way an "at will" employee", and was an employee who could not be demoted or terminated unless the defendant provided plaintiff with all of the procedural and substantive rights afforded to civil service employees, including the due process rights

provided by *Skelly* and its progeny, *Government Code* Sections 3300, et seq, (the "Peace Officer's Bill of Rights"), and other applicable case and statutory authority.

Thus, *CACI* 2405, which applies only to cases involving an employee who is alleging the breach of an implied employment agreement for an unspecified term, is inapplicable to the instant case. Defendant has failed to cite a single case where a court has ever instructed a jury regarding *CACI* 2405 in a case involving the demotion or termination of a civil service protected employee.

Further, defendant also inaccurately claims that the *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 supports that *CACI* 2405 is an appropriate instruction to be given to a jury in a case involving a cause of action by a public employee for retaliation in violation of FEHA. However, the *Nazir* case offers no support for this contention. In *Nazir*, the court stated that:

> "...defendants' position '...places heavy reliance on *Cotran v. Rollings Hudig Hall Internat., Inc., supra*, 17 Cal.4th 93 (*Cotran*), a case defendants cite for the proposition that an adequate workplace investigation "does *not* need to mirror the type of factual inquiry or procedure found in litigation." Maybe not. But *Cotran* hardly supports defendants. *Cotran*, an appeal following a *jury trial*, set forth three elements for determining good cause in termination decisions, the second of which was whether the termination followed '"an appropriate investigation and [was] for reasons that are not arbitrary or pretextual ...' "– an element the Supreme Court expressly observed was "triable to the jury." (17 Cal.4th at pp. 107-108.)" *Nazir v. United Airlines, id.*, 178 Cal.App.4th 243 at 279.

Thus, the court in Nazir specifically found that the defendant was not entitled to rely upon its investigation as the alleged legitimate reason justifying its termination of the plaintiff. As such, defendant herein has failed to cite a single case that supports the

proposition that the defendant in a FEHA retaliation case, and particularly a defendant which is a public entity employer, is entitled to have the jury instructed on the provisions of CACI 2405

While plaintiff asserts that the jury should not have been given CACI 2405 under any circumstances, the instruction proposed by defendant did not even accurately set forth the holding of the *Cotran* case. As set forth above, one of the express elements necessary to support a finding of "good cause" in terminating an employee required by the *Cotran* decision is that the termination not be for reasons that are "pretextual". Defendant's proposed instruction contained no such limitation and thus did not and does not accurately state the law even if the instant case had been a case based upon a common law cause of action for wrongful termination of an employee employed under an implied contract of employment for an unspecified term.

Further, defendant has not cited any authority to support that *CACI* 2405 is an appropriate instruction to be given in a case involving a cause of action for retaliation in violation of *Labor Code* Section 1102.5. *Labor Code* Section 1102.6 provides in pertinent part that:

In a civil action ... brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, **the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.**

Here, the case proceeded to the jury causes of action based both on retaliation in violation of FEHA and retaliation in violation of *Labor Code* Section 1102.5. Under *Labor*

Code Section 1102.6, defendant had the burden of establishing by clear and convincing evidence that plaintiff's demotion and subsequent termination would have occurred for legitimate, independent reasons even if the plaintiff had not engaged in activities protected by *Labor Code* Section 1102.5. Defendant's requested instruction based upon *CACI* 2405 fails to incorporate in any manner the requirement that it prove by clear and convincing evidence that its alleged investigation of plaintiff and disposition thereof would have resulted in the demotion and termination of plaintiff even if plaintiff had not engaged in activities protected by *Labor Code* Section 1102.5.

Under defendant's misguided analysis, an employer who unlawfully terminated an employee in violation of *Labor Code* Section 1102.5 could evade the burden of proof of presenting clear and convincing evidence supporting the termination as required by *Labor Code* Section 1102.6 simply by claiming that it conducted an "adequate investigation" that gave it "reasonable cause to believe" the terminated employee had engaged in misconduct. To accept defendant's argument that it is entitled to an instruction based upon *CACI* 2405 in a case brought for a violation of *Labor Code* Section 1102.5 would stand the burden shifting provisions of *Labor Code* Section 1102.6 on its head and eviscerate the Legistaure's intent to protect whistleblowers, and particularly whistleblowers employed by public entities, from retaliation for disclosing and/or refusing to engage in illegal conduct by their employers.

As set forth above, plaintiff asserts that *CACI* 2405 has no applicability to the instant suit. However, even if it did apply, *CACI* 2405 embodies an affirmative defense which must be properly pled and proven by the defendant. Here, defendant itself apparently did not believe that this affirmative defense applied to this action since defendant failed to plead the elements of *CACI* 2405 in its answer and affirmative defenses in this matter, including the alleged facts that it had done an adequate

investigation that gave it reasonable cause to believe that plaintiff had engaged in misconduct, before it demoted and then terminated plaintiff.

V. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING WITNESSES HAVING HEARD OR READ THE TESTIMONY OF OTHER TRIAL WITNESSES

Defendant also makes the unfounded claim that it was error for the Court to instruct the jury that it could consider whether a witness had heard or read the trial testimony of other trial witnesses in evaluating that witnesses' testimony. The instruction was an appropriate one, particularly in light of the Court's express order excluding all potential trial witnesses other than plaintiff and Deputy Chief Angel from being in present in court to hear the testimony of other trial witnesses. The defendant and its counsel, in blatant violation of the intent and spirit of this order, provided transcripts of the testimony of other trial witnesses to Lt. Puglisi and no doubt other trial witnesses. While plaintiff's counsel believes that a mistrial could have been granted and/or the entire testimony of Lt. Puglisi could have properly been stricken in its entirety, and defendant and its counsel subjected to evidentiary and monetary sanctions for such misconduct, plaintiff sought only a neutral instruction which defendant has not and cannot establish caused defendant any undue prejudice. The instruction which the Court gave specifically directed that the jury could consider the fact that plaintiff had heard the testimony of other trial witnesses in evaluating the plaintiff's trial testimony, and thus applied with equal force to the plaintiff. Defendant's trial counsel were and are both experienced trial litigators who knew full well the purpose and intent for the Court's witness exclusion order yet proceeded nonetheless to violate the intent and spirit of the order by providing trial testimony of other trial witnesses to Lt. Puglisi and no doubt other witnesses. As the Court observed, defendant's actions were no different than if they had a live feed of the trial testimony which they allowed Lt. Puglisi to watch before he testified. The Court's instruction regarding this issue was a proper

and measured response to the defendant's misconduct, and defendant should certainly not be allowed to now profit from its misconduct by obtaining a new trial based upon the giving of a jury instruction necessitated by its misconduct.

VI. PLAINTIFF DID PROVE RETALIATORY ANIMUS

A JNOV motion is a "demurrer" to the evidence on which the verdict is based. Thus, for purposes of a JNOV motion, all evidence supporting the verdict is presumed true. The issue is whether these facts *constitute a prima facie case* or defense *as a matter of law*. [*Moore v. San Francisco* (1970) 5 CA3d 728, 733, 85 CR 281, 283; *Fountain Valley Chateau Blanc Homeowner's Ass'n v. Department of Veterans Affairs* (1998) 67 CA4th 743, 750, 79 CR2d 248, 253]

A JNOV motion is governed by the same rules that govern a motion for directed verdict or nonsuit. [*Hauter v. Zogarts* (1975) 14 C3d 104, 110, 120 CR 681, 684; *Rollenhagen v. City of Orange* (1981) 116 CA3d 414, 417, 172 CR 49, 50 (disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 C3d 711, 738, 257 CR 708, 724)]

The trial judge cannot weigh the evidence or determine the credibility of witnesses on JNOV motions. [*Hauter v. Zogarts* (1975) 14 C3d 104, 110, 120 CR 681, 684; *Clemmer v. Hartford Ins. Co.* (1978) 22 C3d 865, 877, 151 CR 285, 291; *Carter v. CB Richard Ellis, Inc.* (2004) 122 CA4th 1313, 1320, 19 CR3d 519, 524]

Conflicting evidence is resolved against the moving party. The party in whose favor the verdict was rendered is "entitled to the benefit of *every favorable inference* which may reasonably be drawn from the evidence and to have *all conflicts* in the evidence resolved in his favor." [*Castro v. State of Calif.* (1981) 114 CA3d 503, 507, 170 CR 734, 736 (emphasis added); *Fountain Valley Chateau Blanc Homeowner's Ass'n v. Department of Veterans Affairs*, supra, 67 CA4th at 750, 79 CR2d at 253]

Here, in evaluating the evidence at trial, there was overwhelming evidence that supported the verdict in favor of Plaintiff. Likewise, Defendants motion for a new trial on this issue should be denied.

City Manager Mike Flad had the absolute authority to terminate and hire the Chief of Police. Flad hired Scott LaChasse. LaChasse mad the decision to terminate Taylor before the investigations him were completed by Gardiner. In fact, La Chasse offered the Taylor's job to Deputy Chief Angel sometime in December 2009, well before Taylor's investigation was completed.

In fact, it was highly improbable that LaChasse had read any of the documents generated by Gardiner and LaChasse specifically testified that he had not listened to the statement of the alleged victim.

Marsha Ramos, the former mayor of Burbank testified that Flad attempted to bribe her by alluding to offering her a municipal position in Burbank if she cooperated with him. Ramos stated that Flad told her in January 2010, before the investigation concluded, that the there were going to be terminations from top to bottom in the Burbank Police Department. Ramos understood the "top" to mean Taylor. Although Flad denied making these statements, the jury apparently believed Ramos.

After Taylor filed his Government Claim, Flad made the comment "anyone who sues the City, sues me personally." Again, Flad denied he made the comment, but his long time secretary, Tina Gunn stated that he had made it while referring to Bill Taylor. Again, the jury believed Gunn, not Flad.

Flad's statements and the evidence supporting the conclusion that the Gardiner investigation was a sham clearly show retaliatory animus.

Although there is an abundance of direct evidence showing retaliatory animus, the fact that Taylor was terminated shortly only after he filed his DFEH and whistleblower claim, is

further circumstantial evidence of animus.

VII. CONCLUSION

For the foregoing reasons it is respectfully requested that Defendants motion for new trial and/or in the alternative a judgment notwithstanding the verdict be denied.

Dated: May 17, 2012

LAW OFFICES OF GREGORY W. SMITH

By: _____

GREGORY W. SMITH
CHRISTOPHER BRIZZOLARA
Attorneys for Plaintiff
WILLIAM TAYLOR

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is 9100 Wilshire Boulevard, Suite 345E, Beverly Hills, California 90212.

On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Beverly Hills, addressed as follows:

DATE OF SERVICE : May 17, 2012

DOCUMENT SERVED : **PLAINTIFF'S OPPOSITION TO MOTION FOR NEW TRIAL OR ALTERNATIVE JNOV**

PARTIES SERVED : **SEE ATTACHED SERVICE LIST.**

XXX (BY FEDERAL EXPRESS) I caused the aforesaid document(s) to be delivered to Federal Express either by an authorized courier of Federal Express or by delivery to an authorized Federal Express office in a pre-paid envelope for overnight delivery to the addressee(s) as shown on the Service List.

XXX (BY ELECTRONIC MAIL) I caused such document to be electronically mailed to **Christopher Brizzolara, Esq.** at the following e-mail address: samorai@adelphia.net.

XXX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Beverly Hills, California on May 17, 2012.

Selma I. Francia

SERVICE LIST

WILLIAM TAYLOR v. CITY OF BURBANK
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC 422 252

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